

IN THE SUPREME COURT OF MISSOURI

SC 86712

**STATE OF MISSOURI *ex rel.* AMOCO OIL COMPANY,
now known as BP PRODUCTS NORTH AMERICA INC.,**

Relator,

vs.

**THE HONORABLE JOHN J. RILEY,
Circuit Court Judge, 22nd Judicial Circuit, Missouri,**

Respondent.

**ON PRELIMINARY WRIT OF PROHIBITION
FROM THE SUPREME COURT OF MISSOURI
TO THE HONORABLE JOHN J. RILEY, CIRCUIT JUDGE
TWENTY-SECOND JUDICIAL CIRCUIT, MISSOURI
REGARDING CAUSE NO. 002-8365**

**BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF TRIAL
ATTORNEYS IN SUPPORT OF RESPONDENT**

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II. INTEREST OF THE AMICUS CURIAE

The issues presented by this case are of vital importance and interest to others besides the immediate parties, including the Missouri Association of Trial Attorneys ("MATA"). MATA is a non-profit, professional organization consisting of approximately 1,400 trial attorneys in Missouri, most of whom represent citizens of the state of Missouri. For over fifty years, MATA lawyers have vigilantly worked to protect their clients and Missouri citizens from injustice. In doing so, MATA strives to promote the administration of justice, to preserve the adversary system, and to apply its knowledge and experience in the field of law to advance the interests and protect the rights of individuals. MATA's members will be directly affected by the Court's decision in this case.

As a result of its substantial collective experience litigating cases against large corporate defendants, MATA recognizes that the vast majority of documents and information created by corporations today are created and stored electronically. Information held by these parties can often only be obtained through electronic discovery. As a result, courts are increasingly facing the question of whether, and to what extent, traditional paper discovery rules apply in the electronic discovery context. The relatively unsettled nature of the law regarding electronic discovery has prompted many large corporations to use the cost of producing electronic documents as a means of avoiding traditional discovery obligations and frustrating the ability of plaintiffs to obtain the information necessary to succeed on their claims. Not only do such actions undermine the public policy favoring the resolution of disputes on their merits, they

ultimately have a chilling effect on the ability of litigants to pursue meritorious claims. Because the documents and information obtained through discovery often make or break a case, MATA has a considerable interest in ensuring that the liberal traditional discovery rules remain equally applicable to electronic discovery in the Missouri courts.

This brief *amicus curiae* is submitted in support of the Respondent and addresses the issues presented for review in a broader and different perspective than the perspective presented in the parties' briefs. In particular MATA wishes to supplement Respondent's arguments by emphasizing and underscoring the significant policy reasons why the trial court's decision is correct. For these reasons, MATA and its members have a strong interest in explaining why this Court should uphold the decision below.

III. CONSENT OF THE PARTIES

MATA has received written consent from Relator Amoco Oil Company, now known as BP Products North America Inc. (“BP”) to file this brief. Respondent has also consented to the filing of this brief. Therefore, MATA is filing this brief pursuant to Rule 84.05(f)(2).

IV. STATEMENT OF FACTS

MATA adopts and incorporates Respondent's Statement of Facts.

V. SUMMARY

Discovery plays a crucial role in the litigation process. The documents and information made available during discovery often determine the success or failure of a case; therefore, broad and liberal discovery has been called the "cornerstone of the litigation process."¹ Liberal discovery rules are designed to make litigation "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."² To this end, Missouri courts have held that "[t]he rules of discovery are designed to allow the litigants to determine facts prior to trial, obtain access to information about the respective contentions, to preserve evidence, prevent concealment and unjust surprise, and formulate issues for trial."³ The rules of discovery must be enforced to achieve these objectives.⁴

¹ *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002); *see also Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) ("The Rules contemplate a minimal burden to bringing a claim; that claim is then fleshed out through vigorous and expansive discovery.") (internal citations and quotations omitted).

² *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958).

³ *Moore v. Weeks*, 85 S.W.3d 709, 722 (Mo. Ct. App. 2002); *see also State ex rel. Anheuser v. Nolan*, 692 S.W.2d 327, 328 (Mo. Ct. App. 1985) ("The purposes of discovery are to eliminate concealment and surprise, to aid litigants in determining the facts prior to trial, and to provide the litigants with access to proper information with which to develop their respective contentions and to present their respective sides of the

Keeping these general principles in mind, courts are now faced with the task of applying the traditional paper discovery rules to the technological realities of modern complex litigation. It is estimated that over ninety-nine percent of information currently being created and stored is being created and stored electronically.⁵ As a result, the majority of business records are often *only* available in electronic form.⁶

While the ability to electronically create and retain documents has provided tremendous benefits to businesses in terms of efficiency and cost-effectiveness, businesses have attempted to use the cost of producing electronic documents as a means of avoiding traditional discovery obligations and undermining the ability of litigants to obtain information. Recognizing the inequity of this practice, at least one court has held that "[t]o permit a corporation...to reap the benefits of such technology and simultaneously use that technology as a shield in litigation would lead to incongruous and

issues framed by the pleadings. Fulfillment of these purposes is the fulcrum upon which the need for discovery is balanced against the burden and intrusiveness involved in furnishing information.").

⁴ *Moore*, 85 S.W.3d at 722.

⁵ David K. Isom, *Electronic Discovery Primer for Judges*, 2005 Fed. Cts. L. Rev. 1, 1 (2005).

⁶ Steven C. Bennett, *E-Discovery by Keyword Search*, 15 No. 3 Prac. Litigator 7, 7 (2004).

unfair results."⁷ Courts must be aware that "[e]lectronic discovery has the ability to make or break a case, and the burdens of electronic discovery...may be exploited by parties to gain leverage in litigation."⁸ As evidenced by its repeated references to the alleged "hundreds of thousands of dollars" it would have to expend to prepare and review the requested e-mails, the alleged millions of pages of information contained in these e-mails, and the countless hours of attorney review time necessary to review these e-mails prior to production, BP is engaging in precisely this type of exploitation.⁹

⁷ *Linnen v. A.H. Robins Co.*, 1999 Mass. Super. LEXIS 240, at **18 (Mass. Super. 1999).

⁸ Bennett, *supra* note 6, at 8.

⁹ BP argues that the review of the 200,000 remaining e-mails will be unduly burdensome. According to BP, these e-mails could be "equivalent to as many as 4,000,000 pages of documents" because the "501,000 e-mails gathered by BP contained 20 gigabytes of information" and "one gigabyte is the equivalent of 500,000 type-written pages." *Relator's Brief*, at 102. A similar argument is made by the PLAC in their amicus brief. *PLAC Brief*, at 15. However, this argument is merely another attempted scare tactic by BP and the PLAC because "20 gigabytes of information" can easily fit on a couple of CDs and is easily managed using numerous readily available computer programs.

BP even goes so far as to suggest that this Court should determine its discovery obligations in this case based on the expense it *might* incur in other, non-related lawsuits

The discovery rules do not make distinctions between the discovery of paper and electronic information. Under the rules, the responding party must produce *all* responsive documents, and it must bear the cost of producing those documents unless doing so would be unduly burdensome or expensive.¹⁰ Such a cost-shifting analysis is inappropriate in this case, however, because the estimated 200,000 remaining e-mails have already been transferred onto CDs and are easily accessible.¹¹ Therefore, this Court should not fall prey to the "sky is falling" arguments raised by BP and should not abandon long-standing discovery rules and practices simply because the documents at issue are in electronic form.

saying, "[t]his court should consider that, although BP is a large company, because of its size, BP is a defendant in numerous lawsuits involving a variety of claims. If BP were required to spend hundreds of thousands of dollars on potentially non-responsive e-mail production in every lawsuit, or even in just one third of the lawsuits, the cost and burden of litigation could impede company operations." *Relator's Brief* at 103. However, because BP is involved in these "numerous lawsuits," BP is aware that it should maintain its electronic documents in a more manageable form. This is not a difficult task for BP to accomplish since BP easily transferred the remaining 200,000 e-mails at issue in this case to CDs.

¹⁰ See, e.g., *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 358 (1978).

¹¹ See *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) ("*Zubulake I*").

The Respondent's brief and the record demonstrate that this is a fact-intensive matter presently before the Court on the propriety of certain relief awarded to the plaintiffs pursuant to their *Motion for Sanctions*. Thus, MATA respectfully submits that this case does not present the Court with a proper situation in which to announce any new broad, generally applicable rules or procedures for dealing with electronic document discovery issues in Missouri. Rather, the focus of the Court should be on the propriety of the sanctions imposed by the trial court when it exercised its broad discretion to control discovery in this case. Nevertheless, in an obvious effort to distract the Court from the true issues before it (i.e. BP's discovery misconduct), BP and the PLAC have taken the opportunity to advocate for sweeping and far-reaching changes to the procedures and rules currently employed by trial courts in Missouri. It is for this reason that MATA was compelled to weigh in on this matter, and to demonstrate the propriety of the trial court's orders in this case.

VI. ARGUMENT

A. CONTRARY TO BP'S AND PLAC'S FIRST POINTS, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING BP TO PRODUCE APPROXIMATELY 200,000 REMAINING E-MAILS BECAUSE BP'S SEARCH TERM METHODOLOGY WAS NOT A REASONABLE METHOD OF ENSURING THAT ALL RESPONSIVE DOCUMENTS WERE PRODUCED UNDER MISSOURI RULE OF CIVIL PROCEDURE 56.01.

1. The Same General Discovery Rules Apply To Both Paper And Electronic Discovery.

BP argues that "[a] document is not more discoverable simply because it is in electronic form."¹² But the converse is also true – a document is not *less* discoverable simply because it is in electronic form.¹³ As BP admits, and as confirmed by various courts that have addressed the issue, the same discovery rules apply to both paper and electronic discovery.¹⁴ Under Federal Rule of Civil Procedure 34, "a party may request

¹² *Relator's Brief*, at 54.

¹³ See, e.g., *Zubulake I*, 217 F.R.D. at 317; *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002) (collecting cases).

¹⁴ See, e.g. *Zubulake I*, 217 F.R.D. at 316-17 (internal citations and quotations omitted); see generally *The Sedona Principles: Best Practices Recommendations*

discovery of any document, including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations."¹⁵ The "inclusive description of the term document accords with changing technology" and "makes clear that Rule 34 applies to *electronic* data compilations."¹⁶ Accordingly, "electronic documents are no less subject to disclosure than paper records. This is true not only of electronic documents that are currently in use, but also of documents that may have been deleted and now reside only on backup disks."¹⁷

Accordingly, the producing party must "examin[e] each document" unless the "parties . . . stipulate[] or the court . . . order[s] that performing a key word search . . . is desirable and sufficient."¹⁸ Therefore, unless relieved from doing so by the trial court, BP was obligated to review each of the potentially responsive e-mails, which were e-mails gathered from employees it considered to be "key players" in this lawsuit, to

Principles for Addressing Electronic Document Production, at 8 (July 2005) ("[M]any principles from paper discovery appear to be sound in the context of electronic document production.") .

¹⁵ *Zubulake I*, 217 F.R.D. at 316.

¹⁶ *Id.* (internal quotations and citations omitted).

¹⁷ *Id.* at 316-17 (internal quotations and citations omitted).

¹⁸ Isom, *supra* note 5, at II.J.7 (discussing the appropriateness of a key word search for a privilege review).

determine their relevance.¹⁹ Certainly if BP plans to perform a detailed privilege review of these e-mails, it can do the same type of thorough review to determine relevancy. Production of paper documents often involves hand review of hundreds of thousands of scattered pages located throughout the various departments of a company by attorneys who charge their clients for such a review. BP should not be able to avoid its obligation to review the potentially responsive e-mails here simply because they are in electronic form. Furthermore, the facts of this particular case reveal that BP had over *three years* to review these e-mails. Because BP failed to perform this review in the time ordered by the trial court, in addition to repeatedly changing its story as to the number of potentially responsive e-mails and ignoring court orders compelling its production of responsive documents, it was not an abuse of discretion for the trial court to order the full production of all of the approximately 501,000 e-mails as a *sanction* for BP's numerous and repeated

¹⁹ *Relator's Brief*, at 31. These very same principles apply in the context of paper discovery. In *Alexander v. Fed. Bureau of Investigation*, the court held that the defendant's search of approximately 60 boxes of documents for documents on particular topics using indices rather than by an individual search of each box, was an inadequate response to the plaintiff's discovery requests and ordered the defendant to search all of the individual documents contained in the boxes. 194 F.R.D. 305, 313-14 (D.D.C. 2000). Indeed, such comprehensive document searches are common in commercial litigation.

discovery violations.²⁰

In the briefs submitted to this Court, both BP and the PLAC suggest that discovery of electronic documents should be governed by different rules than the rules governing discovery of paper documents because electronic documents are more difficult to gather and review.²¹ Notwithstanding BP's and PLAC's arguments, however, the "discovery of electronic documents is a relatively simple matter when the information is readily accessible."²² BP cannot evade its discovery responsibilities simply because its electronic documents may be disorganized and difficult to search. In paper discovery, relevant documents are rarely stored in one central location and the responding party nonetheless has a duty to find and produce *all* responsive documents, not just those documents that can be easily located. To create a different rule for electronic documents would

²⁰ See, e.g., *Norber v. Marcotte*, 134 S.W.3d 651, 660 (Mo. Ct. App. 2004) ("The trial court is justified in applying sanctions where the record reveals a long course of failure to produce documents, or the facts show a pattern of repeated disregard to comply with discovery...."); *Dobbs v. Dobbs Tire & Auto Centers, Inc.*, 969 S.W.2d 894, 899 (Mo. Ct. App. 1998) (same).

²¹ See *Relator's Brief*, at 50-53; *PLAC Brief*, at 15-16.

²² Mohammad Iqbal, *The New Paradigms of E-Discovery and Cost-Shifting*, 72 Def. Couns. J. 283, 283 (2005).

encourage disorganization by litigants as a means of avoiding discovery obligations.²³ The requesting party should not be penalized for the responding party's disorganization.

2. BP's Use Of Unilateral Search Terms Was Not A Reasonable Method For Locating All Responsive Documents.

BP argues that it should not be required to produce the approximately 200,000 remaining e-mails that did not contain a search term because these e-mails are not relevant to the subject matter of the pending action.²⁴ BP's argument that the e-mails that did not contain a search term are not relevant depends entirely on whether BP followed an "accepted methodology" for searching and reviewing these e-mails. Despite BP's contention that it used an "accepted methodology" for reviewing e-mails, its unilateral electronic searches are not considered an accepted methodology by *any* court.²⁵

BP argues that its search was reasonable because it followed the procedure that the *Zubulake* court, as well as other courts, have established for searching for relevant documents where the documents are stored in an electronic format. However, MATA is not aware of any case, including *Zubulake*, where a court has allowed a party to limit its

²³ BP admits that it is a defendant in numerous lawsuits; thus it should organize its documents. By doing so, BP can control its own costs. *See Relator's Brief*, at 103.

²⁴ Under Missouri law, the term "relevant" is "broadly defined to include material "reasonably calculated to lead to the discovery of admissible evidence." *State ex rel. Dixon Oaks Health Center, Inc. v. Long*, 929 S.W.2d 226, 231 (Mo. Ct. App. 1996).

²⁵ *See Relator's Brief*, at 67, 81.

production based on its own, unilateral search terms as BP did in this case. In *Zubulake*, the very case BP cites to support its proposition that "the producing party should be in charge of its own production,"²⁶ the court emphasized that the parties should *mutually agree* on a list of search terms to use, instructing that "[w]hen the opposing party propounds its document request, the *parties could negotiate a list of search terms* to be used in identifying responsive documents."²⁷ Likewise, in *Dodge v. Riley*, the court affirmed an injunction "requiring [defendants] to allow a court-appointed expert ... to perform automated searches of the evidence under *guidelines agreed to by the parties* or established by the court."²⁸ In *Tulip Computers Int'l v. Dell Computer Corp.*, the court ordered Dell to provide e-mails from the hard disks of certain executives to Tulip's consultant, who would then search those e-mails based on an agreed list of search terms.²⁹ Tulip would then give Dell a list of the e-mails that contained those search terms, and Dell would then produce them subject to its own review for privilege and

²⁶ *Relator's Brief*, at 74.

²⁷ *Zubulake v. UBS Warburg LLC*, 2004 WL 1620866, at *8 (S.D.N.Y. 2004) ("*Zubulake V*") (emphasis added).

²⁸ *Dodge, Warren & Peters Ins. Servs., Inc. v. Riley*, 130 Cal. Rptr. 2d 385, 388 (Cal. App. 2003).

²⁹ 2002 WL 818061, at *7 (D. Del. 2002).

confidentiality.³⁰ In mandating that the parties follow this procedure for the discovery of e-mails, the court noted that this procedure was "fair, efficient, and reasonable."³¹

Even in situations where the parties could not mutually agree on the proper search terms, courts have not allowed the producing party to unilaterally determine the search terms used. For example, in *Alexander v. Fed. Bureau of Investigation*, the court explained that "[p]laintiffs are able to pursue discussions with the Department of Justice regarding targeted and appropriately worded searches of backed-up and archived e-mail and deleted hard drives for a limited number of individuals."³² In *J.C. Assocs. v. Fid. & Guar. Ins. Co.*, the Court ordered the defendant to present to the court the feasibility of performing electronic searches, and the court presented two possible search terms that might gather relevant material.³³ Finally, in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, the court held that "[p]laintiffs' counsel shall formulate a search procedure for identifying responsive e-mails and shall notify each defendant's counsel of the procedure chosen, including any specific word searches. Defendants' counsel may object

³⁰ *Id.*

³¹ *Id.*

³² *Alexander v. Fed. Bureau of Investigation*, 188 F.R.D. 111, 118 (D.D.C 1998) (emphasis added).

³³ *J.C. Assocs. v. Fid. & Guar. Ins. Co.*, 2005 WL 1570140, at *2 (D.D.C. 2005).

to any search proposed by the plaintiffs."³⁴ The cases cited by BP similarly indicate that search terms should be chosen by the requesting party, by the agreement of both parties, or by the court if the parties cannot agree.³⁵ Here, BP failed to follow *any* of these accepted methodologies.

Other sources relied upon by BP to support its argument that the use of unilateral search terms is a reasonable method of reviewing and producing electronic documents actually support the idea that determination of search terms should be a collaborative

³⁴ 205 F.R.D. 421, 433 (S.D.N.Y. 2002). Likewise, in *Proctor & Gamble Co. v. Haugen*, the Court allowed the plaintiff to search the defendant's "electronic database with 25 search terms, which [the plaintiff] was to propose." 179 F.R.D. 622, 632 (D. Utah 1998) (*rev'd in part on other grounds*). In this case the court monitored the search terms proposed by the plaintiff to make sure that it did not request irrelevant information. *Id.*

³⁵ See, e.g., *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 570 (N.D. Ill. 2004) (allowing the requesting party to choose ninety-eight search terms to be applied to a sampling of back-up tapes and later allowing each party to choose four terms from the requesting party's list to search the remaining back-up tapes); *In re Search of 3817 W. West End, First Floor Chicago, Illinois 60621*, 321 F. Supp. 2d 953, 959 (N.D. Ill. 2004) (holding that the requesting party "may tailor a search to target the documents which evidence the alleged criminal activity"); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, 2005 WL 679071, at *1 ¶3 (Fla. Cir. Ct. 2005) (reviewing emails using twenty-nine search terms chosen by the court).

effort by both parties. For example, in the article titled *E-Discovery by Keyword Search*, the author states:

Development of search terms, moreover, might be done in conjunction with the plaintiff's attorney (perhaps with the direction of the court). In essence, the company would describe its electronic records system, and the search method it has used (or proposes to use), and would *invite opposing counsel to suggest any additional search terms* required to capture and preserve essential information.³⁶

Moreover, *The Sedona Principles* specifically state that "[i]n appropriate circumstances, litigants may find it useful to discuss specific selection criteria, including search terms, to be used in searches of electronic data for production."³⁷ Such

³⁶ Bennett, *supra* note 6, at 11 (emphasis added).

³⁷ *The Sedona Principles*, *supra* note 14, at 44. The *Sedona Principles* were published by The Sedona Conference Working Group on Electronic Discovery, which is comprised of lawyers, consultants, academics, and jurists, as a "best practices" guide for lawyers to follow in addressing electronic document production. *See id.* at ii-iii. In addition, "The *Sedona Principles* are intended to complement the Federal Rules of Civil Procedure, which provide only broad standards, by establishing guidelines specifically tailored to address the unique challenges posed by electronic document production." *Id.* at iv.

circumstances exist when, as in this case, electronic data is not "archived in a manner that can be used to readily identify responsive information."³⁸ Thus, rather than supporting BP's position, these sources instead support the majority view that search terms should be mutually agreed upon by the parties, or suggested by the court if no agreement can be reached. Because BP's use of its own, unilateral search terms was not a proper, much less an accepted, method for performing keyword searches, BP cannot show that it performed a reasonable search for responsive documents or that the 200,000 remaining e-mails were not relevant.³⁹

³⁸ *Id.* Had BP stored its electronic data in a more organized fashion, presumably it would not need to hire a third party vendor to help process the e-mails for review and production. *See Relator's Brief*, at 31.

³⁹ Indeed, any party's use of search terms will not locate all responsive documents because any electronic keyword search of e-mails will exclude some relevant documents. As BP and the PLAC concede, e-mail is an informal method of communication. As such, people tend to misspell words, abbreviate words, and use slang and jargon when communicating via e-mail. As a result, keyword searches will miss relevant documents that would most likely be found if the responding party performed a manual search. The requesting party's ability to receive relevant documents should not depend on the parties' ability to guess what words, abbreviations, acronyms, etc. its employees might use to describe relevant information.

B. CONTRARY TO BP'S THIRD POINT, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING BP TO PRODUCE APPROXIMATELY 200,000 REMAINING E-MAILS BECAUSE BP HAS NOT ESTABLISHED THAT PRODUCTION OF THE E-MAILS IS UNDULY BURDENSOME OR EXPENSIVE.

1. The Responding Party Ordinarily Must Bear the Expense of Complying with Discovery Requests.

The general presumption is that the responding party must bear the expense of complying with discovery requests.⁴⁰ This presumption loses no weight in the context of electronic discovery. According to the *Zubulake* court, "[i]n light of the accepted principle that electronic evidence is no less discoverable than paper evidence...any principled approach to electronic evidence must respect this presumption."⁴¹ The requesting party can only be made to pay the costs of discovery if the responding party

Because keyword searches miss relevant documents, to be effective, any electronic discovery procedure must provide that electronic document databases may be searched multiple times if necessary. Allowing additional searches is essential to ensuring that valuable information is not missed.

⁴⁰ See, e.g., *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 358 (1978).

⁴¹ *Zubulake I*, 217 F.R.D. at 317.

can show "*undue* burden or expense."⁴²

The *Zubulake* court rejected as nonsensical the proposition that undue burden or expense automatically arises simply because electronic evidence is involved.⁴³ In fact, electronic evidence is frequently cheaper and easier to produce than paper evidence.⁴⁴ For example, while the costs of electronic discovery may be higher "up front" than in paper discovery, electronic discovery is much more efficient in the long run.⁴⁵ This is true because paper documents must be "processed" (i.e. making working copies, stamping Bates numbers, storing boxes in a central location, etc.) and paper discovery typically flows for many months with an estimated cost of \$10,000 per month in copying

⁴² *Id.* (emphasis added); *see, e.g., Oppenheimer*, 437 U.S. at 358 ("The inquiry in a cost-shifting analysis is not necessarily whether the cost is substantial but whether it is 'undue'"); *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 550-58 (W.D. Tenn. 2003); *Rowe*, 205 F.R.D. at 428. The burden or expense of discovery is "undue" only when it "outweighs the likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." *Zubulake I*, 217 F.R.D. at 318 (internal quotations and citations omitted).

⁴³ *Zubulake I*, 217 F.R.D. at 320.

⁴⁴ *Id.*

⁴⁵ Lesley Friedman Rosenthal, *Electronic Discovery Can Unearth Treasure Trove of Information or Potential Land Minds*, 75-SEP N.Y. St. B. J. 32, 35 (2003).

charges.⁴⁶ In contrast, electronic discovery enables documents to be quickly processed, which greatly cuts down on expenses in the long run despite the sometimes high "up front" costs associated with hiring a third-party vendor to process electronic documents.⁴⁷

Despite BP's arguments regarding the undue burden of producing the e-mails based on the sheer volume of information they may contain, which BP estimates could be as much as four million pages, research has shown that electronic document processing is far less expensive than paper document processing.⁴⁸ For example, one study found that paper discovery cost an average of \$.70 per page, while electronic discovery cost an average of only \$.23 per page.⁴⁹

If courts fall prey to the incorrect assumption, as BP would have the Court do here, that electronic discovery is *always* more expensive or more burdensome than paper discovery, parties will escape discovery obligations by simply arguing that electronic discovery costs too much. This would encourage parties to choose the most expensive vendor to process electronic documents in order to drive up costs and then evade

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Virginia R. Llewellyn & E. Pennock Gheen, *Effective Electronic Discovery*, 46 No. 6 DRI for Def. 21 (2004).

⁴⁹ *Id.*

discovery by arguing the production costs too much.⁵⁰ In addition, BP's argument certainly goes against one of the fundamental purposes of discovery, which is to "allow pretrial discovery to be conducted as promptly and *inexpensively* as possible."⁵¹

2. BP Has Not Established That Production Of The E-Mails Is Unduly Burdensome.

In light of the challenges posed by electronic discovery, some courts have developed a cost-shifting mechanism by which "undue expenses" can be shifted to the requesting party. The most widely utilized approach is the one developed by the *Zubulake* court under which courts weigh (in order of importance) the following seven factors:

- (1) The extent to which the request is specifically tailored to discover relevant information;
- (2) the availability of such information from other sources;
- (3) the total cost of production, compared to the amount in controversy;
- (4) the total cost of production, compared to the resources

⁵⁰In considering the relative ability of each party to control discovery costs and its incentive to do so, the *Zubulake* court acknowledged that the responding party had "complete control over the selection of the vendor" and that it was "entirely possible that a less-expensive vendor could have been found." *Zubulake III*, 216 F.R.D. 280, 288 (S.D.N.Y. 2003).

⁵¹ *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 369 (Mo. 2004) (*en banc*) (emphasis added).

available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.⁵²

In applying this test, the *Zubulake* court stated that "[i]n order to maintain the presumption that the responding party pays, the cost-shifting analysis must be neutral; close calls must be resolved in favor of the presumption."⁵³ The court further emphasized that cost-shifting is appropriate *only* when the requested electronic information is considered *inaccessible*, and that the usual rules of discovery apply to data that is kept in an accessible format.⁵⁴ In addition, where cost-shifting is appropriate, the court noted

⁵² *Zubulake I*, 217 F.R.D. at 322. In developing this test, the *Zubulake* court modified the test established in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, out of concern that *Rowe's* eight factor test may tend to favor the responding party, thereby shifting the costs of electronic discovery too readily. *Id.* at 320-24.

⁵³ *Id.* at 320.

⁵⁴ *Id.* at 324. In *Zubulake I*, the court explained that "inaccessible" information is information that is not considered "readily usable" (e.g. deleted information). 217 F.R.D. at 320. In a later opinion, the court once again confirmed its view that cost-shifting is only appropriate when the information is inaccessible. *Zubulake III*, 216 F.R.D. at 291 ("[T]echnology may increasingly permit litigants to reconstruct lost or inaccessible

that *only* the costs of restoration, i.e. making inaccessible material accessible, and searching should be shifted.⁵⁵ The responding party should *always* bear the cost of reviewing and producing electronic data once it has been converted to an accessible form because the producing party has the *exclusive ability* to control the cost of reviewing the documents.⁵⁶ Applying the *Zubulake* factors, the court in *OpenTV v. Liberate Technologies* held that the cost of restoring inaccessible data to accessible data should be equally split between the parties, but the cost of searching the data once it was restored should be borne by the responding party alone.⁵⁷

Here, BP's electronic data *is* easily accessible because it is already on CDs that can easily be searched. In light of the precedent set by these cases, BP, which has the exclusive ability to choose the vendor to review the requested e-mails, should not be allowed to shift the estimated \$62,000 in review expenses to the plaintiffs.

In addition to setting strict guidelines for when cost-shifting is appropriate, the *Zubulake* court also cautioned against the chilling effect of overzealous shifting of electronic discovery expenses. According to the court:

information, but once restored to an accessible form, the usual rules of discovery apply.").

⁵⁵ *Zubulake I*, 217 F.R.D. at 290.

⁵⁶ *Id.*

⁵⁷ 219 F.R.D. 474 (N.D. Cal. 2003).

Courts must remember that *cost-shifting may effectively end discovery*, especially when private parties are engaged in litigation with large corporations. As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery... [which] will both undermine the strong public policy favoring resolving disputes on their merits, and may ultimately deter the filing of potentially meritorious claims.⁵⁸

The chilling effect of cost-shifting on the ability of litigants to bring meritorious claims is especially apparent in cases such as this one where plaintiffs with relatively limited resources are attempting to properly use the discovery process to obtain information from a multi-billion dollar corporation. Imposing additional hurdles, such as cost-shifting, in cases such as this will only make it that much more difficult for plaintiffs to obtain justice.

In addition to *Zubulake*, several other courts have been unimpressed with litigants' vague attempts to classify all electronic discovery as unduly burdensome. For example, in *In re Brand Name Prescription Drugs Antitrust Litigation*, the court declined to shift costs to the plaintiff even though the defendant was required to search *thirty million pages* of electronic documents, and expended \$70,000 to retrieve and produce these e-

⁵⁸ *Zubulake I*, 217 F.R.D. at 317-18 (emphasis added); *see also Zubulake III*, 216 F.R.D. at 289 ("A share that is too costly may chill the rights of litigants to pursue meritorious claims.").

mails.⁵⁹ According to the court, "the mere fact that the production of computerized data will result in substantial expense is not a sufficient justification for imposing the costs of production on the requesting party."⁶⁰ The court emphasized that if a party chooses to store documents electronically, then the necessity of retrieving those records is a foreseeable risk and the requesting party should not have to bear a cost over which it has no control.⁶¹ Considering the effect of technology on traditional discovery rules the court stated:

It would be a dangerous development in the law if new techniques for easing the use of information became a hindrance to discovery or disclosure in litigation. The use of excessive technical distinctions is inconsistent with the guiding principle that information which is stored, used, or transmitted

⁵⁹ *In re Brand Name Prescription Drugs Antitrust Litig.*, 1995 WL 360526 (N.D. Ill. 1995).

⁶⁰ *Id.* at *2.

⁶¹ *Id.* By choosing to store its documents electronically, BP took the risk that it might have to "spend hundreds of thousands of dollars on potentially non-responsive e-mail production in every lawsuit" despite the fact that "the cost and burden of litigation could impede company operations." *Relator's Brief*, at 103.

in new forms should be available through discovery with the same openness as traditional forms.⁶²

Similarly, in *Linnen v. A.H. Robins Co.*, the court rejected the defendant's attempt to label the plaintiff's motion to compel production of e-mail backup tapes as a "multimillion dollar fishing expedition" and held that the cost of production was one of the "risks taken on by companies who have made the decision to avail themselves of the computer technology now available to the business world."⁶³ BP likewise should not be allowed to withhold information, or to shift the burden of producing information, simply because BP chooses to store it in electronic form.

With respect to the cost of reviewing electronic documents for privilege, this is an expense that is properly borne by BP. In *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, the court held that "the sanctity of the defendants' documents can be adequately preserved at little cost by enforcement of the confidentiality order and by....requirements that the e-mails be reviewed on an attorneys'-eyes-only basis and that review of attorney-client documents shall not be deemed a waiver of the privilege."⁶⁴ The court went on to hold that if the defendant elected to conduct a full privilege review of its e-mails prior to production, it must do so at its own expense, stating:

⁶² *In re Brand Name Prescription Drugs Antitrust Litig.*, 1995 WL 360526 at *2.

⁶³ *Linnen*, 1999 Mass. Super. LEXIS 240, at *18.

⁶⁴ 205 F.R.D. 421, 432 (S.D.N.Y. 2002).

Apparently, the defendants retained privileged or confidential documents in electronic form but failed to designate them to specific files. This situation is analogous to one in which a company fails to shred its confidential paper documents and instead leaves them intermingled with non-confidential, discoverable papers. The expense of sorting such documents is properly borne by the responding party, and the same principle applies to electronic data.⁶⁵

Accordingly, courts usually require the party asserting privilege to pay the privilege review costs.⁶⁶ This Court should do the same and require that BP bear the costs of its own privilege review.

⁶⁵ *Id.*

⁶⁶ See, e.g., *Medtronic Sofamor Danek, Inc.*, 229 F.R.D. at 558 ("Generally, privilege review expenses are borne by the responding party."); Isom, *supra* note 5, at II.J.9.

C. CONTRARY TO BP'S AND PLAC'S SECOND POINTS, THE TRIAL COURT'S ORDERS REQUIRING BP TO PRODUCE APPROXIMATELY 200,000 REMAINING E-MAILS SUFFICIENTLY PROTECT ATTORNEY-CLIENT PRIVILEGED DOCUMENTS.

1. BP Had Nearly *Three Years* To Conduct A Privilege Review But Failed To Do So.

Both BP and the PLAC argue that BP should not be required to produce the 200,000 remaining e-mails because BP allegedly did not have sufficient time to conduct a privilege review of these e-mails, and the protective order entered by the trial court was insufficient to protect against the disclosure of privileged documents.⁶⁷ Although this issue appears to be a factual issue that *amicus* counsel cannot fully address without access to the Appendix, the record reflects that the trial court repeatedly gave BP the exact amount of time that it requested to remove privileged documents from its e-mail production.⁶⁸ The trial court did not, contrary to the assertions of BP and the PLAC, order BP to produce privileged documents.⁶⁹ In fact, BP appears to have had ***over three years*** to complete a privilege review of these documents and it failed to do so.⁷⁰ In light

⁶⁷ See *Relator's Brief*, at 83-93; *PLAC Brief*, at 20-23.

⁶⁸ See *Respondent's Brief*, at 24.

⁶⁹ *Relator's Brief*, at 85-90; *PLAC Brief*, at 21-22.

⁷⁰ See *Respondent's Brief*, at 12.

of BP's repeated failure to produce the requested e-mails, even with four court orders requiring it to do so, and its repeated failure to review the e-mails for privilege and produce a privilege log, it was well within the trial court's discretion to *sanction* BP by requiring them to produce all of the e-mails within 15 days.⁷¹

It is BP, not the plaintiffs, who should be penalized for BP's unreasonable delay in conducting a privilege review of the e-mails. To hold otherwise would violate the purpose of the discovery rules, which is to encourage pretrial discovery to be conducted as promptly and inexpensively as possible.⁷² In addition, to permit parties to avoid discovery and withhold information on the grounds of "too little time" would reward them for delay tactics and noncompliance with court orders. If this Court were to create such a rule, parties will simply not review or produce responsive documents, wait until the court orders production, and then avoid production by arguing that the court order does not allow sufficient time for review. Certainly this result is not one that is envisioned by the rules of discovery.

Along these same lines, BP argues that it did not review the e-mails for more than two and a half years because it was waiting for the outcome of its challenge to the trial

⁷¹ *See Respondent's Brief*, at 33.

⁷² *State ex rel. Ford Motor Company*, 151 S.W.3d at 368 (noting that two years was an "excessive amount of time" to have passed since the plaintiffs first requested documents the defendant withheld as protected by the work product privilege).

court's October 7, 2002, order on plaintiffs' *Motion to Compel*.⁷³ Nothing prevented BP from reviewing its own documents during this lengthy time period. To allow BP to now withhold these e-mails would not only reward BP for its noncompliance with the trial court's orders, but would also encourage parties to file frivolous motions challenging discovery orders as a means of escaping their obligations to produce responsive documents. It would further discourage parties from working together to settle discovery disputes without court intervention.

2. The Trial Court Adequately Addressed BP's Privilege Concerns.

In light of BP's flagrant refusal to comply with the trial court's numerous discovery orders and its failure to conduct a privilege review for nearly three years, the trial court's ruling that BP would not waive its right to raise privilege and relevancy objections at trial was a reasonable method of addressing BP's privilege concerns and afforded adequate protection to any allegedly privileged documents that may inadvertently be produced.⁷⁴

⁷³ See *Relator's Brief*, at 32.

⁷⁴ See *Relator's Brief*, at 42 (quoting the trial court's order as providing, "by producing the materials, BP will not waive any objections based at trial on attorney/client privilege as to any privileged document that may be included in such production, nor any objections as to relevancy."); see also *The Sedona Principles*, *supra* note 14, at 40 ("Because of the large volumes of documents and data typically involved when electronic data is produced, courts should consider entering orders protecting parties against any waiver of privileges or protections due to the inadvertent production of documents and

In *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, the court held that "the sanctity of the defendants' documents can be adequately preserved at little cost by enforcement of the confidentiality order and by....requirements that the e-mails be reviewed on an attorneys'-eyes-only basis and that review of attorney-client documents shall not be deemed a waiver of the privilege."⁷⁵ Similarly, Proposed Federal Rule of Civil Procedure 26(b)(5) would explicitly allow parties to "claw back" already produced material that a producing party later deems "privileged." According to the proposed rule, "[w]hen a party produces information without intending to waive a claim of privilege, it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies."⁷⁶ Therefore the trial court's order was a reasonable attempt to balance BP's right to preserve privilege with the plaintiffs' right to obtain responsive documents.

data.....Such an order should provide that the inadvertent disclosure of a privileged document does not constitute a waiver of privilege, that the privileged document should be returned (or there will be a certification that it has been deleted), and that any notes or copies will be destroyed or deleted.").

⁷⁵ 205 F.R.D. 421, 432 (S.D.N.Y. 2002).

⁷⁶ Isom, *supra* note 5, at II.J.3; *see also The Sedona Principles*, *supra* note 14, at 40.

**D. CONTRARY TO BP'S FOURTH POINT AND PLAC'S THIRD POINT,
THE TRIAL COURT'S ORDERS ADEQUATELY PROTECT PRIVATE,
PERSONAL, AND CONFIDENTIAL E-MAILS.**

**1. The Discovery Rules Allow Extensive Intrusion Into The Affairs Of
Both The Litigants And Third Parties.**

Both BP and the PLAC argue that the trial court's orders should not be enforced because they require the production of private, personal, and confidential e-mails of BP employees.⁷⁷ As a general rule, "the parties may obtain information regarding any matter relevant to the subject matter involved in the pending action so long as the matter is not

⁷⁷ See *Relator's Brief*, at 108; *PLAC Brief*, at 24-33. The PLAC also argues that the trial court's orders would force BP to disclose information that may contain trade secrets. See *PLAC Brief*, at 31. However, even though there is no "absolute privilege" for such information, the protective order currently in place in this lawsuit provides adequate protection for this information. See generally Charles Alan Wright, et al., *Federal Practice and Procedure* § 2043 (2005) ("[T]here is no absolute privilege for trade secrets and similar confidential information; the protection afforded is that if the information sought is shown to be relevant and necessary, proper safeguards will attend disclosure."). Furthermore, "any motion seeking protection on the basis of confidentiality is premature until such time as disclosure of a trade secret is actually requested." *Id.*

privileged."⁷⁸ The Rules "do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the Rules, the only express limitations are that the information sought is not privileged, and is relevant to the subject matter of the pending action. Thus, the Rules often allow *extensive intrusion* into the affairs of both litigants and third parties."⁷⁹

2. Employees Have Reduced Expectations Of Privacy In The Workplace.

The PLAC makes much of the fact that "credit card numbers, tax, financial or health information, and messages to loved ones, neighbors, friends, and others reside in the collections of e-mail systems in companies everywhere."⁸⁰ However, this information does not receive nearly the degree of privacy protection that BP and the PLAC would have this Court believe. In fact, courts have consistently held that employees have reduced expectations of privacy in the workplace.⁸¹ In addition, nearly every court to

⁷⁸ *State ex rel. Dixon Oaks Health Center, Inc. v. Long*, 929 S.W.2d 226, 231 (Mo. Ct. App.1996).

⁷⁹ *State ex rel. Missouri Ethics Comm'n v. Nichols*, 978 S.W.2d 770, 774 (Mo. Ct. App. 1998) (emphasis added) (internal citations and quotations omitted).

⁸⁰ *PLAC Brief*, at 27.

⁸¹ *See, e.g., Yin v. California*, 95 F.3d 864, 871 (9th Cir. 1996) ("Like any employee, Yin has a somewhat reduced expectation of privacy in the workplace").

consider the issue has held that employees have *no privacy interests* in communications made over an employer's e-mail system.⁸²

Employees' reasonable expectations of privacy are further diminished because most companies, and most likely BP, have e-mail and computer-use policies which provide that employees have no personal right of privacy regarding information contained on the company computers or e-mail system and that the company may review

⁸² See, e.g., *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Penn. 1996) ("We do not find a reasonable expectation of privacy in e-mail communications voluntarily made by an employee...over the company e-mail system....."); *Thygeson v. U.S. Bancorp*, 2004 WL 2066746 (D. Or. 2004) (holding an employee could not have had a reasonable expectation of privacy in the e-mails he sent and received using his employer's office e-mail system); *McClaren v. Microsoft Corp.*, 1999 WL 339015 (Tex. Ct. App. 1999) (holding plaintiff had no reasonable expectation of privacy in his e-mail even when it was saved in personal folders and password protected); *Garrity v. John Hancock Mut. Life Ins. Co.*, 2002 WL 974676, *2 (D. Mass. 2002) (holding the use of password protection and personal folders on the company intranet system to save e-mails sent using an office e-mail system was insufficient to create a reasonable expectation of privacy); *Commonwealth v. Proetto*, 771 A.2d 823, 829-32 (Pa. Super. 2001) (holding that by sending a communication over the Internet, the party expressly consents to the recording of the message and demonstrates that he has "no reasonable expectation of privacy in his e-mails").

these e-mails at any time.⁸³ As a result, "employers can diminish an individual employee's expectation of privacy by clearly stating in the policy that electronic communications are to be used solely for company business, and that the company reserves the right to monitor or access all employee Internet or e-mail usage."⁸⁴ Accordingly, the employee e-mails contained on BP's e-mail system cannot be protected from disclosure during discovery proceedings on the ground that they are "personal, private, and confidential." Furthermore, even if these e-mails can be considered "personal, private, and confidential," there is a protective order in place in this lawsuit that provides that any information produced can only be reviewed by attorneys.

⁸³ For example, "[i]n 2001, the 700,000 member American Management Association (AMA) reported that more than three-quarters of this country's major firms monitor, record, and review employee communications and activities on the job, including their telephone calls, e-mails, Internet connections, and computer files." *TGB Ins. Servs. Corp. v. Superior Court*, 117 Cal. Rptr. 2d 155, 161-62 (Cal. App. 2002) (citing American Management Assn., *2001 AMA Survey, Workplace Monitoring & Surveillance, Summary of Key Findings* (April 2001) (available at www.amanet.org/research); Dan McIntosh, *E-Monitoring@Workplace.com: The Future of Communication Privacy in the Minnesota Private-Sector Workplace*, 23 Hamline L. Rev. 539, 541-542, n.10 (2000)).

⁸⁴ *TGB Ins. Servs. Corp.*, 117 Cal. Rptr. 2d at 161-62 (internal citations and quotations omitted).

Therefore, BP cannot avoid producing the e-mails on the grounds that it might violate the privacy rights of BP employees.

V. CONCLUSION

Although this case involves emerging technology issues relating to electronic document discovery, this is an intensely fact-specific case in which BP deliberately and repeatedly disobeyed court orders. Thus, MATA respectfully submits that this is not a proper case in which to announce any new broad, generally applicable rules or procedures related to electronic document discovery issues in Missouri. Rather, the Court should determine that the trial court did not abuse its discretion in imposing sanctions against BP for repeatedly failing to fulfill its discovery obligations. Accordingly this Court should decline to make the preliminary writ absolute and should hold that the trial court's October 12, 2004, and February 25, 2005, orders requiring BP to produce approximately 200,000 remaining e-mails are valid and enforceable.

Respectfully submitted,

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CERTIFICATE OF VIRUS-FREE COMPUTER DISKETTE
AND CERTIFYING WORD COUNT

The undersigned certifies that a copy of the computer diskette containing the full text of Brief of *Amicus Curiae* Missouri Association of Trial Attorneys In Support of Respondent is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 9,100 words, as calculated by the Microsoft Word software used to prepare this brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served, via First Class Mail, on this 21st day of October, 2005, to:

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